

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

Writ Petition No. 3799 of 2007
and
Writ Petition No. 5267 of 2007

Sarvodaya Cooperative Housing
Society Limited ..Petitioner

vs.

1. Subhash Namdeo Shinde & anr. ..Respondents

Shri R.V.Govilkar for petitioner in W.P.No.3799/07 and
for respondent no.1 in W.P.No.5267 of 2007
Shri Shah with Shri R.D.Oak for respondent no.1 in
W.P.No.3799 of 2007 and for plaintiff in W.P.No.5267 of
2007

CORAM: S.C.DHARMADHIKARI J.
20th July, 2007

P.C.

1. Heard Shri Govilkar appearing for petitioner and Shri Shah appearing for respondent no.1. Shri Govilkar seeks leave to delete respondent no.2 only for the purpose of the present petition. Leave granted. Name of respondent no.2 is deleted. Rule. Learned Counsel for the respondent no.1 waives service. Heard forthwith by consent.

2. The grievance of Shri Govilkar appearing for the petitioner society is that the Maharashtra State Cooperative Appellate Court was seized of an appeal being Appeal no.107 of 2002 which was directed against the order passed by the Trial Court in the dispute which was filed

by respondent no.1. It is his grievance that dispute No.17 of 1991 was allowed by Cooperative Court No.2, Pune on 19th January, 2001 and it directed that respondent no.1 is entitled to one flat admeasuring 80 sq.meters in the buildings of the society and that the society is bound to pay mesne profits from the date of dispute till actual physical possession of the vacant flat is handed over to respondent no.1/original disputant. This award was impugned and the Maharashtra State Cooperative Appellate Court having observed that there is no proof with regard to allotment of a specific flat, the Court rejected that plea, but accepting the evidence of the power of attorney holder of respondent no.1 and partially allowing the appeal it declared that since respondent no.1 is entitled to one flat. However, as no specific flat is capable of being allotted, the society should pay compensation/damages at Rs.2,00,000/- with 9% interest thereon from 22nd January, 1991.

3. With the able assistance of the learned Counsel appearing for both sides,I have perused the dispute application, written statement, judgment of the Trial Court and that of the lower Appellate Court.

4. The learned Counsel appearing for respondent no.1 supported the reasoning and submitted that there is no question of the petitioner denying the rights of the first

respondent and if it is not in a position to allot the flat, it should pay the damages not in the sum quantified i.e. Rs.2,00,000/- but at the market rate or in any event as claimed in the accompanying petition.

5. After having perused these materials, I am of the view that there are several contentions which have been urged during the course of hearing of the appeal and before me but there is absolutely no discussion with regard to the same in the impugned order. Only for illustration it can be stated that the pleas raised in the dispute application, according to respondent no.1, center around the claim of respondent no.1 for membership, its acceptance independent of that of the father of respondent no.1 and alleged agreement to allot the flat when the building was under construction. There are several documents including permission from the Urban Land Ceiling Authority which have been referred to in the pleadings.

6. On the other hand, the society's contention is that there is absolutely no material to support either allotment of a specific flat or in lieu of allotment to pay the damages at the rate claimed much less the rate awarded with interest. There is no evidence led with regard to quantum of Rs.2,00,000/- when there is no evidence available with regard to the allotment of the flat, then on what basis this award/decreed for damages is

passed is not known and discernible.

7. I find that the above issues have not been addressed at all in the sketchy judgment of the lower Appellate Court. It was expected of it as a court of first appeal to have dealt with all the submissions and considered the relevant material so also give detailed reasoning while dealing with them. The above issues as raised cannot be said to be not germane and relevant to the controversy. The course open to me is to admit both the petitions and consider the prayer for interim relief. However, that would only prolong and delay the matter. The dispute is of the year 1991, the Trial Court's award is of 2001. The appeal was preferred in 2002 and it is decided in 2007. If the petitions are kept pending here, some more time would have been lost.

8. In the above circumstances, I suggested to both sides that proper and just course would be to allow these petitions by quashing the appellate order and restore the appeal to the file of the Cooperative Appellate Court for being dealt with and disposed of on merits afresh as expeditiously as possible. Both sides do not oppose such a course.

9. In the above circumstances Rule is made absolute in

both the petitions to the extent that the order passed by the Cooperative Appellate Court on 13th February, 2007 is quashed and set aside. Appeal No.107 of 2002 preferred by the petitioner/appellant/society stands restored to file of the Cooperative Appellate Court, Pune for hearing afresh on merits and in accordance with law as expeditiously as possible and in any event within six months from the date of receipt of the copy of the order of this Court.

10. Needless to state that I have not gone into the merits of the controversy and observations made are only for the purpose of justifying the ultimate conclusion of remand. Cooperative Appellate Court must deal with the appeal uninfluenced by any of the observations and on its own merits and in accordance with law. Needless to further state that the Cooperative Appellate Court should not be influenced by its own order which stands quashed and set aside but must deal with the rival contentions uninfluenced by the same. All contention of both sides are expressly kept open. Rule absolute in the above terms with no order as to costs.

(S.C.DHARMADHIKARI J.)